Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

No. 81-5195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL JONES,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE GEORGIA LEGAL SERVICES PROGRAM, INC.

ROBERT B. REMAR
Counsel of Record
P. O. Box 1319
Douglasville, Georgia 30133
(404) 949-1271

JONATHAN A. ZIMRING
133 Luckie Street
Eighth Floor
Atlanta, Georgia 30303
(404) 656-6021

ATTORNEYS FOR AMICUS CURIAE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... iv

INTEREST OF GEORGIA LEGAL SERVICES PROGRAM, INC., AS AMICUS CURIAE..... 2

SUMMARY OF ARGUMENT..... 3

ARGUMENT

I. THE COURT SHOULD DECIDE ONLY THE NARROW QUESTION OF THE CONSTITUTIONALITY OF THE DISTRICT OF COLUMBIA PROCEDURES GOVERNING THE RELEASE FROM HOSPITALIZATION OF PERSONS FOUND NOT GUILTY BY REASON OF INSANITY OF PETTY OFFENSES..... 6

II. THE RELEASE PROCEDURES CONTAINED IN D.C. CODE §24-301(e) DEPRIVE PETITIONER OF THE EQUAL PROTECTION OF THE LAWS..... 12

A. There Is No Rational Basis For Treating Persons Committed Following Acquittal By Reason Of Insanity Of Petty Offenses More Harshly For Purposes Of Release Than Persons Committed Under The Civil Commitment Code..... 13

B. Strict Scrutiny Must Be Applied To This Legislative Classification Since It Infringes Upon The Fundamental Right To Liberty..... 17

III. DIFFERENCES BETWEEN THE PROCEDURAL PROTECTIONS ACCORDED INSANITY ACQUITEES AND THOSE COMMITTED UNDER THE D.C. CIVIL COMMITMENT CODE CANNOT BE JUSTIFIED ON THE BASIS OF A CONTINUING PRESUMPTION OF MENTAL ILLNESS AND DANGEROUSNESS..... 22

A. The Presumption Of Mental Illness and Dangerousness Fails To Meet The Constitutional Standard Established In Leary v. United States, 396 U.S. 6 (1969)..... 22

(1) The Presumption Of Continuing Mental Illness Has No Scientific Basis..... 26

(2) The Presumption Of Mental Illness Ignores The Different Mental States Of Insanity For Criminal Responsibility, Competence To Stand Trial, and Mental Illness For Purposes Of Civil Commitment..... 31

(3) The Presumption Of Continuing Dangerousness Is Overbroad Because It Assumes That All Criminal Acts Constitute A Danger To Self Or Others..... 36

CONCLUSION..... 42

TABLE OF AUTHORITIES

Cases:	Page(s)
Addington v. Texas, 441 U.S. 418 (1979)	9, 19, 30
Baxstrom v. Herold, 383 U.S. 107 (1966)	18, 20, 30
Benham v. Edwards, 501 F.Supp 1050 (N.D. Ga. 1980), appeal docketed, No. 80-9052 (5th Cir. Dec. 17, 1980)	passim
Bethea v. United States, 365 A.2d 64 (D.C. App. 1976) cert. denied, 433 U.S. 911 (1977)	26
Board of Education v. LaFleur, 414 U.S 632 (1974)	25
Bolling v. Sharpe, 347 U.S. 497 (1954)	13
Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968)	11, 32
Buckley v. Valeo, 424 U.S. 1 (1976)	13
County Court of Ulster County v. Allen, 442 U.S. 140 (1979)	24
Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969)	37
Dorsey v. Solomon, 604 F.2d 271 (4th Cir. 1979)	11

Dusky v. United States, 362 U.S. 402 (1950)..... 35

Eisenstadt v. Baird, 405 U.S. 436 (1972)..... 18

Harper v. Virginia Board of Elections, 383 U.S. 663 (1965)..... 18, 20

Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968)..... 24

Humphrey v. Cady, 405 U.S. 504 (1972)..... 19

In Re: Barnard, 455 F.2d 1370 (D.C. Cir. 1971)..... 24

Jackson v. Indiana, 406 U.S. 715 (1972)..... 19

Jones v. United States, 432 A.2d 364 D.C. App. 1981)..... passim

Leary v. United States, 395 U.S. 6 (1969)..... 22, 24

O'Connor v. Donaldson, 422 U.S. 563 (1975)..... 10, 19

Overholser v. O'Beirne, 307 F.2d 882 (D.C. Cir. 1962)..... 36

People v. McQuillan, 221 N.W.2d 569 (Mich. 1974)..... 20

Powell v. Florida, 579 F.2d 324 (5th Cir. 1978)..... 11, 32

San Antonio Independent Sch. Dist. v. Rodriquez, 411 U.S. 1 (1973).. 13

Shapiro v. Thompson, 394 U.S. 618 (1968) 18

Specht v. Patterson, 368 U.S. 605 (1967)..... 19

State v. Krol, 344 A.2d 289 (N.J. 1975)..... 20

Tot v. United States, 319 U.S. 463 (1943)..... 24

United States v. Cohen, No. 80-00382 (D.C. Cir. March 5, 1982)..... 21

United States v. Ecker, 543 F.2d 1978 (D.C. Cir. 1976)..... 15, 16

Vitek v. Jones, 445 U.S. 480 (1980) 9, 19

Vlardis v. Kline, 412 U.S. 441 (1973) 25

Constitutional Provisions

U.S. CONST. amend V..... passim

U.S. CONST. amend XIV, §1..... passim

Statutes

D.C. Code §24-301(d)..... passim

D.C. Code §24-301(e)..... passim

D.C. Code §21-521..... 40

D.C. Code §21-545(b)..... 7, 14, 26

D.C. Code §§21-546,548 14

Ga. Code §§26-702, 703 33

Ga. Code §88-501 34

Ga. Code §88-504.3 40

Textbooks and Articles

Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective, 15 Ga. L. Rev. 1065 (1981) , ... 24

Diamond, The Psychiatric Prediction of Dangerousness, 123 U.Pa. L. Rev. 439 (1974) 30, 39

German and Singer, Punishing The Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity, 29 Rutgers L. Rev. 1011 (1976) 19, 24, 27, 28

A. Goldstein, The Insanity Defense (1972) 40

Kirschner, Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis, 20 Ariz. L. Rev. 233 (1978) 19

L. Kolb and A. Noyes, Modern Clinical Psychiatry (8th ed. 1973) 27

Pasework, Pantle, and Steadman, The Insanity Plea in New York 1965-1967, 51 N.Y. S.B.J. 186 (1979).. 29

Procedural Safeguards for the Involuntary Committment of the Mentally Ill in the District of Columbia, 28 Cath, U.L. Rev. 855 (1979)... 32

Schwartz, Moving Backward Confidently, Mich. S.B.J. 847(1975)..... 29

Sherman, Guilty But Mentally Ill, A Retreat from the Insanity Defense, 7 Amer.J. of Law and Medicine 237 (1981)..... 29

No. 81-5195

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MICHAEL JONES,
Petitioner,

versus
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE GEORGIA LEGAL SERVICES PROGRAM, INC.

ROBERT B. REMAR
Counsel of Record
P. O. Box 1319
Douglasville, Georgia
30133
(404) 949-1271

JONATHAN A. ZIMRING
133 Luckie Street
Eighth Floor
Atlanta, Georgia
30303
(404) 656-6021

ATTORNEYS FOR AMICUS CURIAE

INTEREST OF GEORGIA LEGAL SERVICES PROGRAM, INC., AS AMICUS CURIAE*

Georgia Legal Services Program, Inc. (hereinafter GLSP), is a non-profit Georgia corporation engaged in the provision of legal assistance to poor persons in civil cases. GLSP attorneys represent the plaintiff class in Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), appeal docketed, No. 80-9052 (5th Cir., December 17, 1980). Benham was a class action challenge to the procedures governing the commitment and release of insanity-acquitees in Georgia. Certain of the issues raised in this case may have an effect on the Benham litigation, and may, consequently, effect the liberty interests of the class of all present and future insanity-acquitees in Georgia. Because of its ethical obliga-

*Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, consent to the filing of this amicus curiae brief has been given by all parties.

tions to the plaintiff class in Benham, GLSP has filed this brief amicus curiae.*

SUMMARY OF ARGUMENT

This Court, pursuant to its own practice, is obligated to decide constitutional questions on the narrowest possible ground presented. The Court should not reach the question of the validity of Jones' initial commitment under D.C. Code §24-301(d) because no appeal was taken from the initial order. For purposes of this case, it must be assumed that the initial commitment was constitutional.

The hypothetical maximum prison term that would have been imposed on the petitioner is irrelevant because, assuming a valid initial commitment hearing, commit-

*GLSP has been actively involved during the last ten years in representing the mentally disabled and those alleged to be mentally disabled. For example, attorneys from GLSP represented the respondents before this Court in Parham v. J.R., 442 U.S. 613 (1979).

ment must end when the petitioner no longer meets the civil commitment criteria. The issue actually presented by the facts of this case concerns the validity of the procedures governing the petitioner's release from confinement. The review of the judgment below should be limited to the question of whether, as a matter of equal protection, the District of Columbia may impose more stringent release procedures on persons lawfully committed following acquittal by reason of insanity of petty offenses than are imposed on persons committed under the District's Mental Health Code. Since the Court of Appeals failed to properly address this issue, the judgment should be vacated and the case remanded.

If the Court determines that the issue is properly before it, then the Court should hold the release procedures as applied to insanity-acquitees charged with

petty offenses to be lacking a rational basis and therefore in violation of the Equal Protection Clause. Even if rational, the procedures fail to pass the strict scrutiny test. The heightened level of review must be applied because the fundamental right of liberty is at stake.

Should the Court reach the question of the constitutionality of the initial commitment procedures, then it should reject the presumption of mental illness and dangerousness as providing any justification for less stringent procedures for insanity-acquitees. The presumption has no factual or scientific basis, it is inherently inconsistent and it is overbroad.

ARGUMENT

I.

THE COURT SHOULD DECIDE ONLY THE NARROW QUESTION OF THE CONSTITUTIONALITY OF THE DISTRICT OF COLUMBIA PROCEDURES GOVERNING THE RELEASE FROM HOSPITALIZATION OF PERSONS FOUND NOT GUILTY BY REASON OF INSANITY OF PETTY OFFENSES.

This case presents a narrow question: Are the District of Columbia procedures governing the release of insanity acquitees constitutional as applied to persons who were acquitted of petty, nonviolent offenses? While the Court of Appeals went through an elaborate, albeit flawed, analysis of the constitutionality of the procedures governing initial commitment, that analysis was unnecessary to the decision of the case. Jones v. United States, 432 A.2d 364, 373-375 (D.C. App. 1981).[1/] Jones did

---

1/ The initial commitment hearing under D.C. Code §24-301(d) was euphemistically referred to as a "50-day release hearing" by the court below. Jones

not directly challenge the initial commitment under D.C. Code §301(d) since he had not appealed from the commitment order entered at that first hearing. Id., at 368. Instead, he argued that once the hypothetical maximum prison sentence had expired, he either had to be released or civilly committed pursuant to D.C. Code §21-545(b). Thus the rationale advanced by the court below in support of the constitutionality of the initial commitment procedures was, at best, obiter dictum and should be treated as such by this Court.[2/] For pur-

---

v. United States, at 368. In actuality it is an initial commitment hearing since it is the first proceeding at which a determination is made as to the acquitee's present mental state and present need for hospitalization.

2/ The two principle differences between the commitment of insanity acquitees under D.C. Code §24-301(d) and commitment under the D.C. Mental Health Code, D.C. Code §21-545(b), addressed by the Court of Appeals were: (1) the availability of a jury trial for civil committees that was unavailable to

poses of this case, it can be assumed that Jones' initial commitment under D.C. Code §24-301(d) was constitutional.

Nor is it proper to frame the issue in terms of whether or not the initial commitment under §24-301(d) is punitive and therefore limited to the theoretical maximum prison sentence. The maximum length of time that an acquitee could have been incarcerated for the criminal offense is irrelevant because the acquitee has been found not guilty. Concepts of punishment are no longer applicable to him. By making the argument that the maximum length of

---

insanity acquitees, and (2) placing the burden of proof, by a preponderance of the evidence, on the insanity acquitee when the burden of proof in civil commitment proceedings was on the government by clear and convincing evidence. While amicus believes that a resolution of these issues is unnecessary to a decision in this case, it has addressed the constitutionality of placing harsher procedural burdens on insanity acquitees as a result of a presumption of continuing mental illness and dangerousness in the event that the Court decides to reach the question.

incarceration governs the type of procedures that are constitutionally required, the petitioner concedes too much and protests too little. Indeterminate commitment of those who have been determined, through constitutionally valid procedures,[3/] to be mentally ill and dangerous, whether insanity acquitees or civil committees, is proper so long as there are constitutionally adequate procedures for periodic review and release. "Commitment must be

---

3/ The initial commitment procedures cannot, consistent with due process, be punitive in nature because the individual has been found to be not criminally responsible. The state's interests following acquittal are the same as with other persons alleged to be mentally ill; treatment of the individual and protection of the community. Cf., Addington v. Texas, 441 U.S. 418 (1979). This determination must be made in strict conformity with the Due Process Clause. Vitek v. Jones, 445 U.S. 480 (1980). The court below correctly recognized that commitment of insanity acquitees cannot constitutionaly be based on considerations of punishment. It erred in holding that those procedures were constitutionally free of punitive effects.

justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist. O'Conner v. Donaldson, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) (emphasis added, cites omitted). Thus, an insanity acquitee must be released from confinement when he is no longer mentally ill or dangerous regardless of whether the maximum sentence that could have been imposed was one year or ten years, or whether that theoretical term has expired.

Taken to its logical conclusion, petitioner's argument would establish a quid pro quo of less stringent procedural protections for insanity acquitees in exchange for civil commitment procedures when the theoretical maximum prison term has ex-

pired. This approach flies in the face of the rationales underlying both civil commitment of the mentally ill and the plea of not guilty by reason of insanity. Moreover, it ignores the principal that persons found not guilty by reason of insanity are entitled to procedures substantially similar to those accorded civil committees. Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); Powell v. Florida, 579 F.2d 324 (5th Cir. 1978); Dorsey v. Solomon, 604 F.2d 271 (4th Cir. 1979); Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980).

The maximum length of possible incarceration is relevant only as it relates to the underlying act. The state may legitimately have an interest in requiring stricter release procedures for someone who has been acquitted of a serious violent crime than for one who has been acquitted of a petty, non-violent offense. The release

procedures cannot, however, be harsher for one group of similarly situated individuals without some compelling state interest.

The equal protection issue is, therefore, properly framed as follows, "Can persons who have been committed as mentally ill and dangerous to themselves or others following acquittal by reason of insanity of petty, non-violent offenses be treated more harshly for purposes of release from hospitalization than persons committed as mentally ill and dangerous to themselves or others under the Civil Commitment Code?" Since the Court of Appeals did not address the true constitutional question, the judgment should be vacated and the case remanded for proper consideration.

II.

THE RELEASE PROCEDURES CONTAINED IN D.C. CODE §24-301(e) DEPRIVE PETITIONER OF THE EQUAL PROTECTION OF THE LAWS.

A. There Is No Rational Basis For Treating Persons Committed Following Acquittal By Reason Of Insanity Of Petty Offenses More Harshly For Purposes Of Release Than Persons Committed Under The Civil Commitment Code.

Should the Court decide to reach the question of the constitutionality under the Equal Protection Clause[4/] of the release procedures contained in D.C. Code §24-301(e), it must determine the proper standard of review. San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973). However, the question of whether a heightened level of review is required can be avoided if it is determined that the procedures lack a rational basis.

The substantive standard for commit-

4/ This challenge is brought in the District of Columbia under the Fifth Amendment. That amendment incorporates an equal protection provision. Bolling v. Sharpe, 347 U.S. 497 (1954). The test applied is the same as that brought under the Fourteenth Amendment. Buckley v. Valeo, 424 U.S. 1, 93 (1976).

ment in the District of Columbia is the same for civil committees and insanity acquitees. Both must be mentally ill and likely to injure themselves or others if not hospitalized. Jones, at 372; D.C. Code §21-545(b). The procedures by which the determination is made and reviewed are quite different.

Civil committees have the right to immediate release without judicial intervention or approval whenever the hospital staff determines that they no longer meet the civil commitment criteria. D.C. Code §21-546. Civil committees are also entitled to periodic review of their need for continued hospitalization. D.C. Code §§21-546 and 548. Insanity acquitees, however, cannot be released except upon the approval of the committing court. D.C. Code §24-301(e). Even if the hospital staff certifies that the acquitee should be released

as no longer mentally ill or dangerous the government can object and demand a hearing. Insanity acquitees can therefore be involuntarily detained notwithstanding the opinion of the hospital staff that they are no longer in need of treatment. In contrast, the civilly committed are always released when the hospital makes such a determination. See, United States v. Ecker, 543 F.2d 1978, 1974 (D.C. Cir. 1976). The result of this difference in treatment is that insanity acquitees may be retained in the hospital even though they are no longer mentally ill or dangerous.

Amicus believes that there is no rational basis for applying these harsher release procedures to insanity acquitees who have been acquitted of petty, nonviolent offenses.[5] There is no principled

---

5/ The question of what release procedures can constitutionally be applied to persons acquitted

way to distinguish between persons committed under the Mental Health Code and insanity acquitees charged with petty, non-violent offenses who were committed under D.C. Code §24-301(d). In fact, given the standard that committees must be both mentally ill and likely to injure themselves or others, there are undoubtedly many civil committees whose prior history poses a greater risk of dangerousness than do many insanity acquitees. Moreover, as discussed in greater detail infra, there are numerous civil committees who have committed criminal acts but who have avoided the criminal process through the exercise of prosecutorial or police discretion. See, Benham

---

of serious violent crimes does not have to be decided. It is sufficient to note that for equal protection purposes a person acquitted of shoplifting cannot be equated with a person acquitted of murder, rape or armed robbery. See, United States v. Ecker, at 198 n.80.

v. Edwards, at 1069.

Given the lack of any real distinctions between the two classes, the rational relationship test is sufficient to dispose of the equal protection claim. However, should the Court deem the distinctions between the two groups to be rational, then it must consider whether a stricter level of scrutiny should be applied.

B. Strict Scrutiny Must Be Applied To This Legislative Classification Since It Infringes Upon The Fundamental Right To Liberty.

In analyzing the legislative classification as it related to the initial commitment, the court below applied only a rational basis test. Jones, at 372. The application of the lower standard resulted from the court's failure to determine whether a fundamental right was infringed by the procedures. Where such rights are involved, "they must be closely scrutinized and carefully confined." Harper v. Vir-

ginia Bd. of Elections, 383 U.S. 663, 670 (1965). The test that emerges from this scrutiny is whether the classification is "necessary to the achievement of a compelling state interest," Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) (emphasis in original).

This heightened level of scrutiny has firmly established itself in the Court's analysis of equal protection claims, although its use is limited to those rights characterized as "fundamental" or those given express or implicit recognition in the Constitution. Shapiro v. Thompson, 394 U.S. 618, 642 (1968) (Steward, J., concurring). In an unbroken line of cases, the Court has recognized that confinement in prisons, prison-mental facilities, and mental health hospitals invades a basic and fundamental liberty interest. See, Baxstrom v. Herold, 383 U.S. 107 (1966);

Specht v. Patterson, 386 U.S. 605 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975); Addington v. Texas, 441 U.S. 418 (1979); and, Vitek v. Jones, 445 U.S. 480 (1980).

This recognition has not lead to the use of a strict scrutiny test in any of the cases because the statutory schemes under review all fell to procedural due process challenges or were found violative of the Equal Protection Clause utilizing the rational basis test. See generally, German & Singer, Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity, 29 Rutgers L. Rev. 1611 (1976); and, Kirschner, Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis, 20 Ariz. L. Rev. 233 (1978). It is too simplistic an

analysis to find, as the court below did in analyzing Baxstrom, that because this Court has never explicitly reached the issue the use of a lesser standard is required.

Although some lower courts have been reluctant to utilize the strict scrutiny standard, see, e.g., People v. McQuillan, 221 N.W.2d 569, 579 n.4 (Mich. 1974), the results of their analysis made it unnecessary. See, e.g., State v. Krol, 344 A.2d 289 (N.J. 1975). Further, not only has the strict scrutiny analysis for the deprivation of liberty interests never been rejected, this Court, in articulating the standard in Harper v. Virginia Bd. of Elections, cites as support its decision earlier that term in Baxstrom v. Herold. Harper, at 670.

Recently the United States Court of Appeals for the D.C. Circuit evaluated the

statutory scheme at issue here as it applied to persons found not guilty by reason of insanity in the District's federal courts. United States v. Cohen, No. 80-00382 (D.C. Cir., March 5, 1982). The court held the commitment procedures in D.C. Code §24-301 to be unconstitutional as violative of equal protection.[6] In reaching its conclusion, the court applied a strict scrutiny analysis based upon the fundamental liberty interest involved:

> Cohen's liberty is involved in this case. Because we are hard put to think of a constitutional right that is more fundamental, we readily conclude that a hard look must be taken at the provisions of the D.C. Code that require Cohen's commitment after his acquittal of the federal offense... (footnote omitted) Cohen, slip. op., at 6.

6/ The result of the decision in Cohen is that persons found not guilty by reason of insanity in the District's federal courts may not constitutionally be subjected to the §301 commitment and release procedures, whereas persons found not guilty by reason of insanity in the District's "local" courts may be so subjected.

Consistent with the long line of cases that correctly view commitment to a mental institution as a massive curtailment of liberty, this Court should apply strict scrutiny to the procedures under review. There being no compelling interest that can support the differences in procedures, the scheme should be struck down as it relates to those acquitted of petty offenses.

III.

DIFFERENCES BETWEEN THE PROCEDURAL PROTECTIONS ACCORDED INSANITY ACQUITEES AND THOSE COMMITTED UNDER THE D.C. CIVIL COMMITMENT CODE CANNOT BE JUSTIFIED ON THE BASIS OF A CONTINUING PRESUMPTION OF MENTAL ILLNESS AND DANGEROUSNESS.

A. The Presumption of Mental Illness and Dangerousness Fails to Meet the Constitutional Standard Established in Leary v. United States, 395 U.S. 6 (1969).

In sustaining the validity of the differences between the procedures applicable to the commitment of insanity acquitees and those applicable to civilly committed per-

sons, the Court of Appeals relied heavily on a presumption of continuing mental illness and dangerousness as applied to insanity acquitees. Jones v. United States, at 373-375. Under the court's analysis, denying the insanity acquitee the right to a jury trial and placing the burden of proof on the acquitee, disabilities not suffered by civil committees, are justified on the basis that the previous finding of not guilty by reason of insanity establishes a presumption that the acquitee is, at the time of the initial commitment hearing, both mentally ill and dangerous to himself or others. Commitability can therefore be justified by the acquitee's failure to rebut, by a preponderance of the evidence, the evidentiary presumption of present mental illness and dangerousness. Jones, at 375.

In order for this presumption to pass

constitutional muster under the Due Process Clause, it must be shown with "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36 (1969), accord, County Court of Ulster County v. Allen, 442 U.S. 140, 157-158, n.16 (1979); also see, Tot v. United States, 319 U.S. 463, 467 (1943).7/

7/ While Leary, Allen and Tot were criminal cases, the substantive standard established is applicable in the civil commitment context since the fundamental right to liberty is at stake in both proceedings. It is upon this basis that the lower federal courts have applied many of the procedural protections available in criminal trials to civil commitment proceedings. See, for example, In Re: Barnard, 455 F.2d 1370 (D.C. Cir. 1971) (right to a speedy hearing); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (right to counsel). See generally, German & Singer, at 1020, and Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Prospective, 15 Ga. L. Rev., 1065, 1074 (1981). Moreover, this Court has held that in civil cases it is arbitrary and unconstitutional to deprive an individual of rights by employing a presumption which may be generally true

Thus, in order for the presumption to be constitutionally valid, it must be demonstrated with substantial assurance that it is more likely than not that a person who has sometime in the past been found to be not guilty by reason of insanity is currently both mentally ill and dangerousness. There is, however, no scientific basis for a presumption that a mental state that once existed in the past now exists in the present. Moreover, a presumption of present mental illness based on a previous finding of not guilty by reason of insanity ignores the different and distinct mental states that are applicable at different stages of the proceedings. Lastly, to presume that every criminal act equates with present danger to self or others is both overbroad

---

of persons in the individual's class. See, Board of Education v. LaFleur, 414 U.S. 632, 644-646 (1974); Vlandis v. Kline, 412 U.S. 441 (1973).

and irrational.

(1) The Presumption of Continuing Mental Illness has no Scientific Basis.

A finding of not guilty by reason of insanity in the District of Columbia establishes that at the time of the commission of the offense, the defendant, because of mental disease or defect, lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law. Bethea v. United States, 365 A.2d 64 (D.C. App. 1976), cert. denied, 433 U.S. 911 (1977). Under the reasoning of the Court of Appeals in this case, that finding supports the evidentiary presumption that at the time of the commitment hearing the defendant has a psychosis or other disease which substantially impairs mental health, and that as a result the person is likely to injure himself or others. D.C. Code §21-545(b),

§24-301(d). This presumptive leap has no factual basis in medicine or psychiatry.

In the first place, the presumption ignores the passage of time and the benefits of treatment. In Michael Jones' case, nine months elapsed from his arrest to his initial commitment hearing. Jones, at 368. It is not unusual for more than a year to elapse from the time of arrest to the time of trial. See, cases cited in German & Singer, at 1018, n.32. Often, as in Jones' case, this time is spent in a mental health facility. To presume a continuity of mental condition is to assume that all mental states are static and unamenable to treatment. Moreover, the rapid and dramatic effect of psychotropic medications in relieving psychotic symptoms is well documented. See, L. Kolb and A. Noyes, Modern Clinical Psychiatry, 623-624 (8th ed. 1973). Whatever validity the presumption

may have had when it was first formulated prior to the mid-nineteenth century,[8/] that validity has been eclipsed by the development of modern psychiatry.

The record in Benham v. Edwards establishes the lack of any scientific foundation for the presumption. Dr. Lloyd Baccus, a professor of forensic psychiatry at Emory University, and Dr. Timothy Bullard, the director of forensic services at a state mental hospital, both testified that there is no medical basis for a presumption of continuing mental illness or dangerousness. Both rejected the presumption as contrary to all the advances that have been made in the treatment of the mentally ill. Benham, at 1068; Record, Vol. II, p.12-38. Dr. Baccus further testified that only by

---

8/ See, Benham v. Edwards, 501 F. Supp. 1050, 1067 (N.D. Ga. 1980).

evaluating the specific individual can a proper determination be made as to whether or not that individual presently is mentally ill or dangerous.[9/] The Court of Appeals erred when it accepted the validity of the presumption without the benefit of any evidence to support it.

The rationality of the presumption is further undercut by the inability of psychiatrists to accurately associate mental illness and dangerousness. This Court has recognized the lack of certainty and fal-

---

9/ Nor is there any reliable data showing that insanity acquitees are more likely to commit criminal acts after their release than are civil committees. In fact, the studies that have been done show that insanity acquitees have relatively low recidivism rates. For example, of the 150 insanity acquitees released in Michigan in 1974, only 2 were later prosecuted for felony offenses. Schwartz, Moving Backward Confidently, 54 Mich. S.B.J. 847, 848 (1975); also see, Pasewark, Pantle and Steadman, The Insanity Plea in New York, 1965-1967, 51 N.Y. S.B.J. 186 (1979); Sherman, Guilty But Mentally Ill, A Retreat From the Insanity Defense, 7 Amer. J. of Law and Medicine, 237 (1981).

libility in psychiatric diagnosis. See, Addington v. Texas, at 430-431. This observation is supported by a number of statistical studies that demonstrate the unreliability of psychiatric predictions of dangerousness. The findings of these studies consistently demonstrate that psychiatrists over-predict dangerousness. See, Diamond, The Psychiatric Prediction of Dangerousness, 123 U.Pa. L. Rev. 439, 444-447 (1974). For example, Professor Diamond, in analyzing the results of studies done following Baxstrom v. Hearld, states that:

> ...it is clear from the Baxstrom studies that of these 967 persons who had been convicted at one time of serious crimes, and who were designated as mentally ill and dangerous to others in order to justify their further confinement, only a very few were actually dangerous. One can only conclude that psychiatrists who make such judgments tended to over-predict dangerousness greatly, by a factor somewhere between ten and a hundred times the actual incidence of dangerous behavior. Diamond, at 447.

Psychiatrists cannot, with any degree of scientific certainty or reliability, predict the dangerousness of persons convicted of serious crimes even when they have examined and studied the individuals. A presumption of dangerousness arising from acquittal of a crime regardless of its severity has no validity at all.

(2) The Presumption of Mental Illness Ignores the Different and Distinct Mental States of Insanity for Criminal Responsibility, Competence to Stand Trial and Mental Illness for Purposes of Civil Commitment.

The presumption of continuing mental illness fails to recognize the different mental states required for a finding of not guilty by reason of insanity, competence to stand trial, and civil commitment. It treats the different mental states and the different legal standards and objectives that underlie them as though they were the same. Assuming the validity of the pre-

sumption at all, at best it can only be based on the type of mental state under consideration. An acquittal by reason of insanity in the District of Columbia is based upon the jury's determination that it is more likely than not that the defendant was insane at the time of the offense. The verdict does not speak to the defendant's present mental condition. Bolton v. Harris, at 646-650. Before the insanity acquitee can be civilly committed, the trial court must make a determination that the acquitee is presently mentally ill and likely to injure himself or others. See, Procedural Safeguards for the Involuntary Commitment of the Mentally Ill in the District of Columbia, 28 Cath. U. L.Rev., 855 (1979). Commitment, therefore, depends upon findings of fact different from those established by the jury's acquittal by reason of insanity. Powell v. Florida, 579

F.2d 324, 330 (5th Cir. 1978). A jury finding that at the time of the commission of a criminal offense, no matter how petty, the defendant lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law as a result of mental disease or defect does not equate with a finding that at the present time the defendant has a psychosis or other disease which substantially impairs mental health and that as a result the person is likely to injure himself or others.[10/]

10/ The disparity between the two findings is even more extreme in those jurisdictions that utilize the M'Naghten Rule and which have stringent standards for civil commitment. For example, in Georgia a defendant can be found not guilty by reason of insanity if at the time of the act the "person did not have the mental capacity to distinguish between right and wrong in relation to such act" or "because of mental disease, injury or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmasted his will to resist." Ga. Code §§26-702 and

Moreo er, the presumption of continuing mental illness lacks internal consistency. Assuming, arguendo, that the mental states are the same, the presumption ignores the fact that between the time of the commission of the offense and the date of the civil commitment hearing there has been an intervening finding that the defendant is competent to stand trial. A defendant who proceeds to trial, even for purposes of presenting an insanity defense, must have "sufficient present ability to consult with

---

703. In order to be subject to involuntary civil commitment in Georgia, an individual must present "a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or others, or (2) who is so unable to care for his own physical health and safety as to create an imminently life-endangering crisis." Ga. Code §88-501(v). Not only is mental incapacity to distinguish right from wrong not congruent with mental illness, it does not, by its own terms, constitute evidence that the individual presents a substantial risk of imminent harm to himself or others. See, Benham v. Edwards, at 1068.

his lawyer with a reasonable degree of rational understanding...[and must have] a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1950) (per curiam). Therefore, between the time of the commission of the alleged act and the civil commitment hearing, there has been a trial at which the defendant is mentally competent. Assuming that the three mental states are the same, as the presumption does, the presumption that a mental state once proven to exist continues until disproven would require a presumption of present sanity at the commitment hearing. The internal inconsistency of the presumption establishes that it is nothing more than a device of convenience designed to justify the lack of procedural protections for the commitment of insanity acquitees.

(3) The Presumption of Continuing Dangerousness is Overbroad Because it Assumes that All Criminal Acts Constitute a Danger to Self or Others.

The presumption as it relates to dangerousness assumes that the commission of a criminal act, sometime in the past and regardless of its nature, establishes that the person is presently likely to injure himself or others if not hospitalized. However, not all insanity acquitees have committed acts which constitute a likelihood of injury to themselves or others. Michael Jones' shoplifting of a coat is not the type of violent act which manifests a likelihood of injury to himself or other persons.

Some courts have held that any criminal act, no matter how petty and non-violent, equates with dangerousness to self or others. For example, in Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1962), the court stated that a "'bad check'

passer at large endangers himself by exposure to additional violations and additional arrests, trials and confinements, to say nothing of the serious effect on the public of his predatory tendencies." This extreme view was subsequently rejected by that court in a case holding that a trial court should consider the magnitude, likelihood, and frequency of the expected harm, rather than applying a blanket assumption that because the defendant had committed a criminal act in the past he is presently dangerous. Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969).11/

11/ The common perception that the insanity defense is used almost exclusively for serious violent crimes is contrary to the facts. Statistics gathered in Georgia in response to the Benham litigation show that of the 127 insanity acquitees in Georgia mental hospitals on January 31, 1981, 79 had been acquitted of serious violent crimes and 48 had been acquitted of crimes other than serious violent crimes. Letter of Martin J. Rotter, Forensic Services Consultant, Division of Mental

The tendency of some courts to equate the commission of any criminal act with present dangerousness is an example of reification; the process by which an action or a behavior becomes translated into an attribute. It has rightly been rejected as an unsound and irrational process. One commentator has pointed out the danger of labeling persons based on prior events.

> For example, stealing is an action. To label a man who steals as a thief is to reify the action into an attribute. It implies that the man will continue to steal no matter what the situation, and that his thieving behavior is a consequence only of factors within him. For the same reason, one should not label a man who acts

---

Health and Mental Retardation, Georgia Department of Human Resources, to Robert B. Remar, Attorney for Plaintiff, in Benham v. Edwards (May 5, 1981). The 48 included 7 acquitted of motor vehicle theft, 8 acquitted of criminal trespass, 8 acquitted of simple battery, 1 acquitted of reckless conduct, 1 acquitted of possession and sale of marijuana, 1 acquitted of prostitution, and 1 acquitted of obscene and abusive language. See, generally, German & Singer, at 1023.

> violently and causes harm as dangerous, for by so doing one has transformed an action into an attribute and has knowingly or unwittingly made the prediction that there will be future acts of violence, and that these future acts will be determined by qualities of the individual, not by the relationship or the circumstances. Although it may be convenient to label persons, to reify behavior into attributes, and thus to predict future conduct, it must be recognized that such a process has no scientific or logical basis and that there is no reason to expect that such predictions will come true. Diamond, at 449 (emphasis added).

The irrationality of labeling the insanity acquitee as mentally ill and dangerous is further highlighted by the fact that many civil committees have also committed criminal acts but have escaped the criminal justice system solely by virtue of the policeman's discretion. Most states allow a police officer to take an individual to a mental hospital for an emergency commitment where the police officer has probable cause for believing that the

individual is a mentally ill person requiring involuntary treatment. See, for example, Ga. Code §88-504.3 and D.C. Code §21-521. The exercise of this discretion by the police is not an unusual event. In fact, the policeman's decision to bring the mentally ill person to the hospital rather than the police station is "genuinely competitive with the criminal process." A. Goldstein, The Insanity Defense, 172 (1967). Other civil committees are diverted at the prosecutorial stage of the proceedings where, through the exercise of prosecutorial discretion, criminal proceedings are foregone in favor of civil commitment proceedings. See, Benham v. Edwards, at 1069, and case cited therein. There are thus substantial numbers of civil committees who have committed criminal acts but who have escaped the criminal justice process. No presumption of dangerousness

is applied to these individuals nor are they subjected to less stringent procedural protections.

The presumption of present mental illness and dangerousness, if left unrebutted, is sufficient to authorize the indeterminate commitment of the insanity acquitee. Like those committed under the Mental Health Code, the insanity acquitee is entitled, as a matter of both equal protection and due process of law, to a judicial determination which attains a greater degree of certainty than that generated by the scientifically unsupported presumption employed by the Court of Appeals in this case. This Court should reject the presumption of mental illness and dangerousness as a basis for applying harsher procedures in the commitment and release of insanity acquitees.

CONCLUSION

There is no principled way to distinguish between civil committees and insanity-acquitees charged with petty offenses. The two groups must, therefore, be treated similarly for purposes of determining suitability for release from confinement. If the Court reaches the issue, it should hold that as a matter of equal protection of the laws, Michael Jones must be accorded the release provisions of the D.C. Mental Health Code. The Court should not base its decision on the expiration of the hypothetical maximum prison sentence because, regardless of the length of sentence, commitment must cease when the reasons supporting it cease. The Court should also reject the presumption of mental illness and dangerousness as a justification for applying harsher procedures to insanity acquitees. The presumption is a 19th Cen-

tury aberration with no basis in fact or reason.

Respectfully submitted,

ROBERT B. REMAR
Counsel of Record
P.O. Box 1319
Douglasville, GA
30133
(404) 949-1271

JONATHAN A. ZIMRING
133 Luckie St., N.W.
8th Floor
Atlanta, GA 30303

ATTORNEYS FOR AMICUS